IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1250 OF 2003
IN
CRIMINAL APPEAL NO. OF 2003

Shri. Pravin B.Mane ..Applicant

Vs.

Jayeshbhai Sanghvi & Anr. ..Respondents

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Mr.V.B.Ghorpade Advocate for Applicant
Mr.G.K.Jadhav for Respondent no.1
Mr.Rajesh More A.P.P. for the State

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CORAM: SMT.V.K.TAHILRAMANI,J.
DATE : SEPT. 2,2005

P.C.

1. Heard the learned advocate for the applicant-original complainant, learned advocate for the respondent-original accused and learned A.P.P. for the State.

2. The applicant i.e. the complainant had filed the complaint against the respondents under Section 138 r.w. 141 of Negotiable Instruments Act and under Section 420 of IPC. The said complaint was

filed before the learned Metropolitan Magistrate, Vth Court, Dadar, Mumbai. Thereafter it was numbered as CC No.408/S/2002. Thereafter, it was transferred to the Metropolitan Magistrate, 33rd Court, Dadar, Mumbai. By order dated 17.2.2003, the learned Magistrate dismissed the complaint as the complainant and his advocate were absent. Being aggrieved by the said order, the applicant has approached this Court.

3. I have heard both sides and perused the Roznama pertaining to the said case. On 11.7.2002, the complainant and his advocate were present. It appears that on 18.1.2003, the complainant as well as his advocate were absent. As the complainant and his advocate were absent, hence, the matter was adjourned to 7.2.2003. On 7.2.2003, the respondent no.1 accused preferred an application for dismissal of the complaint. The matter came to be adjourned to 17.2.2003 for orders. On 17.2.2003 again the complainant and his advocate were absent and on that day, the complaint came to be dismissed.

4. The Supreme Court in the case of **Mohammad Azeem**

Vs. A.Vankatesh and Anr. [2003 ALL MR (Cri) 400 (S.C.)] has held that if the complaint has been dismissed for non-appearance of the complainant, the complaint ought to be restored on file on sufficient cause being shown. However, it is submitted by Mr.Jadhav that the complainant was not absent only on a single occasion but he was absent on three occasions and hence, the complaint was rightly dismissed by the learned Magistrate.

5. It is stated by the learned advocate for the applicant that on 17.2.2003 i.e. day on which the order of dismissal was passed, the learned advocate for the complainant had attended the Court. In fact, an application came to be preferred by the learned advocate for the applicant seeking exemption in respect of personal appearance of the complainant as the marriage of the complainant was to take place on 20.2.2003 at Satara and hence, it was not possible for the complainant to remain present before the Court on 17.2.2003. It is submitted that when the matter was called out, however, the advocate was not present before the Court as he was in the High Court at that time.

After finishing the matter in the High Court, he immediately rushed back to the 13th Court Dadar and on learning about the fact that the complaint was dismissed, an application came to be preferred for restoration of the complaint. However, the complaint was not restored, hence, the applicant has approached this Court.

6. The learned advocate for the respondent has not disputed the fact that on 17.2.2003 when the matter came to be called out before the learned Magistrate and it came to be dismissed, the advocate for the complainant was in the High Court conducting a matter. So also, he has not disputed the fact that the marriage of the applicant was to take place at Satara on 20.2.2003. Satara being far away from Mumbai, it is quite natural that on 17.2.03 the applicant would not be there in Mumbai when his marriage was to take place at Satara on 20.2.2003. All these facts are not disputed but it is submitted that on account of fact that the complainant was absent, the complaint was rightly dismissed.

7. As the learned Magistrate was not aware of any of these facts i.e. relating to Advocate for the complainant being in the High Court and also the fact about the marriage of the complainant on 20.2.2003 at Satara, I do not find any error on the part of the Magistrate in dismissing the complaint. However, looking to the facts of the present case and in the interest of justice, I am of the opinion that the complaint deserves to be restored.

8. Even though Section 256 of Cr.P.C. provides that the complaint can be dismissed if the complainant does not appear, a bare perusal of the said Section clearly shows that it is not the only option available to the Magistrate if the complainant is absent. The latter part of Section 256 of Cr.P.C. clearly indicates that "the Magistrate has another option i.e. to adjourn the hearing of the case to some other date. The third option which is available to the Magistrate under this Section is that, the Magistrate may proceed with the case if in the opinion of the Magistrate, the personal appearance of the complainant is not necessary. The reasons for absence of the

complainant can be numerous. Sometimes the reasons may be beyond the control of the complainant. If the complainant's presence is not required on that particular day, the Magistrate may dispense with the attendance of the complainant and proceed with the case. On the day that the complaint was dismissed, the matter was not specifically kept for recording the evidence of the complainant or for cross-examination of any witness by the complainant. In such case looking to the facts of this case, I am of the opinion that sufficient cause has been shown for restoration of complaint, hence, the complaint deserves to be restored.

9. Thus, the order of the learned Magistrate dated 17.2.2003 is set aside and in the interest of justice, the complaint i.e.CC No.408/S/2002 is restored to file. Record and Proceedings be sent back to the trial Court forthwith. Parties to appear before the trial Court on 3.10.2005.

10. At this stage, Mr.Jadhav, the learned advocate for the respondent no.1 states that if the complaint is being restored then at least, some

costs may be paid to respondent no.1. The said request is reasonable, hence, the applicant is directed to pay costs to respondent no.1 quantified at the amount of Rs.2,500/-. The said costs to be deposited within a period of three weeks before the trial Court. Respondent no.1 is at liberty to withdraw the said amount. Parties to remain present before the trial Court on 3.10.2005.

11. Application is disposed of.

[SMT.V.K.TAHILRAMANI,J.]